

### Remarks

The Office reopened prosecution on October 11, 2006. Appellants replied thereto on January 5, 2007. In response thereto, the Office issued a final Office Action on April 9, 2007 ("final Action"). Reconsideration is respectfully requested. Claims 1-50 remain pending.

### Request For Withdrawal Of The Premature Final Rejection

Appellants respectfully submit that the final Action should be withdrawn as it is premature and legally improper. The Action includes rejections which were not present in the prior Office Action dated October 11, 2006 ("prior Action"). Specifically, the final Action includes at least the following new (premature) grounds of rejection:

- 1). Claims 1, 3, and 24-25 were rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over Lavigne in view of Nemoto, Keskin et al, and Tabata. Note the final Action's numbered paragraph 13 in comparison with the prior Action's numbered paragraph 14.
- 2). Claim 46 was rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over Higham '456. Note the final Action's numbered paragraph 14 in comparison with the prior Action's numbered paragraph 15.
- 3). Claim 45-47 were rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over Colson '297 in view of Lavigne. Note the final Action's numbered paragraph 18. The prior Action did not have a "Colson '297 in view of Lavigne" rejection.

Furthermore, the prior Action (at numbered paragraph 33) confirms that the above listed grounds of rejections 1), 2), and 3) were withdrawn. Thus, any reintroduction of these withdrawn rejections constitutes a new ground of rejection.

Also, Appellants' Reply filed January 5, 2007 did not contain any amendment to claims 1, 45, 46, or 47. Thus, Appellants could not have necessitated a new ground of rejection to these claims.

As a courtesy to the Office, which missed the typographical error in claim 24, the inadvertent period (at line 11) was replaced with a semi colon. Claim 25 depends from claim 24. Appellants also do not view the courtesy correction to claim 24 as an amendment on the merits.

MPEP § 706.07(a) states:

"Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p)."

An Office Action cannot be final where the Examiner introduces a new ground of rejection that was not necessitated by an amendment (or by an information disclosure statement). That is, a final Office Action can never be valid where it includes a new rejection against a claim which was not amended (and no IDS was filed) in response to the immediately previous non final Office Action. This is the current situation.

Appellants respectfully submit that since claims 1, 45, 46, or 47 were not amended (and claims 24-25 were not amended on the merits), the new grounds of rejection made against these claims could not have been necessitated by amendment thereto. Furthermore, as no information disclosure statement was filed, the new ground of rejection could not have been based on information submitted in an information disclosure statement. The record shows that the

conditions did not meet the legal criteria for applying a final rejection. Therefore, the final rejection is *prima facie* premature.

A final Office Action can never be valid where it includes a new rejection against an independent claim which was not amended (and no IDS was filed) in response to the immediately previous non final Office Action. Again, this is the current situation. The Examiner is asked to complete the record by providing the legal citation apparently relied upon for newly rejecting non amended independent claim 1 and then making final this new rejection.

Appellants also respectfully submit that the Examiner (via the improper finality of the rejection) is committing prejudicial error by depriving Appellants of their administrative due process rights (e.g., timely notice of the Examiner's position and opportunity for unhindered response thereto). Appellants have not been given fair opportunity in accordance with 37 C.F.R. 1.111 to properly rebut the Office's new grounds of rejection. Again, Appellants respectfully submit that the finality of the Office Action dated April 9, 2007 should be withdrawn.

#### The Rejections

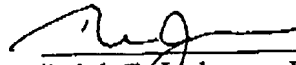
Appellants respectfully disagree with the pending rejections for the reasons set forth in their Amendment filed January 5, 2007, which is herein incorporated by reference. Appellants respectfully submit that all pending claims are allowable for the reasons previously presented.

#### Conclusion

Appellants respectfully submit that this application is in condition for allowance.

The undersigned is willing to discuss any aspect of the Application by phone at the Office's convenience.

Respectfully submitted,



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